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NO. 80-2153

IN THE

Supreme Court of the United States

October Term, 1980

DR. J. B. KENLEY, et al.,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the test used by the First Circuit Court of Appeals in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) or is the test used by the Fourth Circuit Court of Appeals in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979) the appropriate test for use by the federal courts in defining a "prevailing party" plaintiff in federal civil rights attorney's fees award litigation.

2. Does the filing of a frivolous suit by a plaintiff to obtain a job for which the plaintiff never applied, but which the plaintiff could have had if she had applied, constitute the kind of "special circumstance" which authorizes a district court in its discretion to deny a plaintiff attorney's fees under the Civil Rights Attorney's Fees Awards Act.

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LIST OF PARTIES TO THE PROCEEDING

As required by Rule 21.1(b) of the Rules of this court, the parties to this proceeding are listed below:

PETITIONERS

1. James B. Kenley, M.D.
   Virginia State Health Commissioner

2. Wayne Harding
   Director of Personnel, Virginia State Health Department

3. Sarah E. Sayres
   former Director of Public Health Nursing, Virginia State Health Department

4. Harold H. Hedley (deceased)
   former Director of Personnel
   Virginia State Health Department

The address of petitioners is 109 Governor Street, Richmond, Virginia, 23219.

RESPONDENT

The sole respondent is Mrs. Willie Young, Public Health Nurse C, Virginia State Health Department, Bedford, Virginia.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DR. J.B. KENLEY, et al.,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Dr. J.B. Kenley, et al., (hereinafter Kenley), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in Young v. Kenley, et al., on February 23, 1981.

OPINIONS BELOW

The second and final opinion of the Fourth Circuit Court of Appeals in Young v. Kenley is reported at 641 F.2d 192 (4th Cir. 1981) and appears as Appendix A. The second decision of the United States District Court for the Eastern District of Virginia is reported at 485 F.Supp. 365 (E.D. Va. 1980) and is reprinted as Appendix B. The initial Fourth Circuit opinion which vacated and remanded an earlier decision of the District Court is reported at 614 F.2d 373 (4th Cir. 1979) and is attached as Appendix C. The initial District Court decision is reported at 465 F.Supp. 1260 (E.D. Va. 1979) and is reprinted as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 23, 1981. On March 9, 1981, Kenley filed a petition for rehearing; on March 24, 1981, the petition for rehearing was denied.

The Order denying a rehearing is reprinted at the end of Appendix A. As required by 28 U.S.C. § 2101(c) this Petition for Certiorari is being filed within 90 days of the denial of a rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1988 and 2000e-5(k) of Title 42 of the United States Code are set forth as Appendix E and F respectively.

STATEMENT OF THE CASE

On January 25, 1978, Willie E. Young filed suit against Dr. J.B. Kenley, State Health Commissioner, et al., alleging racial discrimination by the Virginia State Health Department in the denial of a promotion. The United States District Court for the Eastern District of Virginia (district court) granted Kenley's motions to dismiss Young's original complaint and two amended

complaints. On March 23, 1978, the court dismissed the original complaint for failure to state a claim upon which relief could be granted. The first amended complaint was dismissed on June 16, 1978 for failure to comply with Title VII jurisdictional requirements and failure to allege a 42 U.S.C. § 1983 claim within the applicable statute of limitations. A second amended complaint was dismissed on October 19, 1978 for failure to join the proper defendants and failure to assert a proper 42 U.S.C. § 1983 claim. Young's last amended complaint was filed on October 30, 1978. No answer was ever filed by defendants, nor were defendants ever directed by the district court to file an answer.

On November 2, 1978, the court heard plaintiff's evidence and continued the case until a later date to hear defendants' evidence. Before that date arrived, the

parties agreed to a settlement which is more fully described below.

Plaintiff's claim as presented by her proof at the November 2 trial, supplemented by the stipulated and uncontroverted facts, rested upon the following circumstances. In 1956 Mrs. Young graduated from Meharry Medical College School of Nursing, a predominantly black nursing school in Nashville, Tennessee. When plaintiff graduated from Meharry, the baccalaureate program in nursing at Meharry was accredited by the National League for Nursing; however, it was not accredited by the League in the more specialized field of public health nursing. In 1973, Mrs. Young was hired as a Public Health Nurse Grade Level "A" (PHN-A) by the Virginia Department of Health. Mrs. Young, claiming racial discrimination, successfully sought promotion to PHN-B without being required to take the promotion examination for that position. However, at

that time plaintiff was not qualified for promotion to PHN-C because she had not been graduated from a nursing school which was accredited in public health nursing. Until February, 1977, the specification for the job of PHN-C in the Virginia Department of Health included a requirement of a degree from a nursing school accredited in public health nursing.

This requirement, however, was eliminated in February of 1977. In 1964, the National League for Nursing changed its accreditation standards so that it no longer gave separate accreditation for both general nursing and public health nursing. After 1964, no school was accredited for nursing unless it was also accredited for public health nursing. In 1977, the Department of Health changed the job specifications for PHN-C to eliminate the requirement of accreditation in public health nursing. Thus, the changed specifications had the

effect of qualifying plaintiff for the PHN-C position. Mrs. Young was not specifically told prior to the filing of her lawsuit in January, 1978, that the job specification for PHN-C had changed eleven months earlier. However, she did have ready access to the personnel manual in which the change was published. Before filing this lawsuit, Young did not apply for promotion to PHN-C. At a pretrial conference held on June 23, 1978, the district judge discussed with Mrs. Young's counsel Mrs. Young's failure to apply for the job and urged her attorney to have his client file an application.

The lawsuit was filed, as previously noted, on January 25, 1978. On June 23, 1978, Mrs. Young was formally informed in a letter from the Deputy State Health Commissioner that the job specifications had been changed and that she was eligible for promotion to PHN-C and was invited to apply for promotion. On August 16, 1978

Mrs. Young did apply for this promotion. She successfully passed the promotional test and received the job before her case went to trial.

At the November 2 trial, plaintiff asserted two claims. First, Mrs. Young challenged the requirement that a person seeking promotion to PHN-C be a graduate of a nursing school accredited in public health nursing. Young claimed that Meharry was not accredited in public health nursing by the National League for Nursing, a white-dominated agency, because the League was racially discriminatory in its accreditation decisions. Further, Mrs. Young alleged that despite its racially discriminatory nature, the Department of Health accepted the League's refusal to accredit Meharry.

Secondly, Mrs. Young claimed that defendants were aware that the regulation which barred her promotion had been

eliminated and had a duty to notify her of this change; she alleged their failure to do so was deliberate, willful, malicious and racially motivated.

The district court, after receiving Mrs. Young's evidence and reviewing the stipulated facts, rejected both claims.

In settlement of this action, plaintiff received a promotion to PHN-C, a payment of $992.00, and reclassification of her former PHN-B position with the Department of Health in Bedford, Virginia, as a PHN-C position. Without a reclassification of her job, plaintiff would have had to leave Bedford and move to another location in Virginia where a Level C position was available. On the basis of this settlement, plaintiff's counsel sought an award of attorney's fees.

The District Court in Young v. Kenley, 465 F.Supp. 1260 (E.D. Va. 1979) held that Mrs. Young was not a prevailing party since Kenley's actions in settling the case could

not have been required by law had the case gone to judgment. The court concluded that in settling the case, Kenley had acted gratuitously and thus refused to award attorney's fees. Furthermore, the court found the suit was frivolous and unnecessary.

The Fourth Circuit Court of Appeals, Young v. Kenley, 614 F.2d 373 (4th Cir. 1979), vacated the District Court's judgment and remanded the case in light of the Fourth Circuit's decision in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979).

On remand, the District Court in Young v. Kenley, 485 F.Supp. 365 (E.D. Va. 1980), found that plaintiff had marginally prevailed but again denied attorney's fees, holding for the second time that special circumstances warranted this denial. Special circumstances found by the court consisted of two factors. First, at the time of the filing of suit, Mrs. Young had

no grievance against the defendants. She alleged the existence of a regulation barring her advancement which the district court explicitly found did not exist. Secondly, after learning of the February 1977 elimination of the regulation which barred her promotion, and long after she filed her suit, she unnecessarily and inexplicably persisted in the suit. The court reiterated its earlier finding that this suit was unnecessary and frivolous. Young, 485 F.Supp. at 370.

In Young v. Kenley, 641 F.2d 192 (4th Cir. 1981), the Fourth Circuit Court of Appeals reversed a second time and remanded holding that plaintiff achieved her objective through the suit and thus, the award of attorney's fees was appropriate.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. This Case Presents the Opportunity for this Court to Eliminate Confusion Among the Circuit Courts Concerning the Definition of a Prevailing Party in a Case Brought under Civil Rights Statutes Which Terminates in a Consent Decree.

Although it is well-established that termination of a suit by settlement does not preclude award of attorney's fees, Maher v. Gagne, 448 U.S. 122 (1980), the First and Fourth Circuit Courts of Appeals have articulated different tests to determine whether a plaintiff is to be considered a prevailing party.

The First Circuit Court of Appeals in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) developed a two-prong test to determine if a plaintiff had prevailed. Nadeau requires that a plaintiff prevail in both a legal and a factual sense.

> [T]wo critical questions...should control whether or not plaintiffs are prevailing parties on those issues

> resolved by the consent decree. The first question is one of fact. We agree with the Tenth Circuit in Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) that no award is required if the court determines that plaintiffs' suit was completely superfluous in achieving the improvements undertaken by defendants on plaintiffs' behalf. Nadeau, 581 F.2d at 281.

Secondly, it is essential under Nadeau that the plaintiff prevail in a legal sense:

> Even if plaintiffs can establish that their suit was causally related to the defendants actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, the defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense. Nadeau, 581 F.2d at 281.

Thus, if the Nadeau test is applied to the facts of Young v. Kenley, Young cannot be a prevailing party because no relationship exists between defendant's actions in settling the case and a legal requirement to do anything at all for Mrs. Young. The district court found, Young, 465 F.Supp. at

1265, that Mrs. Young was not legally entitled to any relief of any kind. Rather, the court found, 465 F.Supp. 1263, that had Mrs. Young, at any time during the period from February 1977, when the revision in Health Department hiring policy was drawn, to January 1978, when suit was filed, applied for the promotion she sought, she would have received it.

In Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), the Fourth Circuit Court of Appeals cited Nadeau with approval and adopted the factual/legal approach to determine if plaintiff had prevailed. However, in Young v. Kenley, 641 F.2d 192 (4th Cir. 1981), the court ignored the legal aspect of the Nadeau test and held that plaintiff had prevailed simply because she achieved part of the back pay she claimed and a reclassification promoting her. In so ruling, the Fourth Circuit failed to consider that there exists no causal

relationship, in law or fact, between Mrs. Young's suit and the repeal of the complained-of employment policy. The District Court specifically found, based on its familiarity with the case, that Kenley's actions in settlement were purely gratuitous. See Maher v. Gagne, 448 U.S. at 130, where this Court approved of a district court's finding on the prevailing party issue based on its "familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages."

II. Plaintiff's Filing of a Suit Which Was Frivolous and Without Foundation Constitutes a Special Circumstance Which Mandates Denial of Attorney's Fees.

In Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968), this Court articulated the standard which controls awards of attorney's fees in suits brought under civil rights statutes: "a prevailing

plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." This case presents exactly the kind of special circumstance which makes an award of attorney's fees unjust. The District Court in both of its decisions characterized Mrs. Young's suit as frivolous and one which need never have been filed. The requirement which prevented Mrs. Young's promotion was eliminated in February of 1977; Mrs. Young filed suit in January of 1978 without even filing an application for the job she sought through her suit. The District Court stated that:

> At the time of the filing of the suit, the only bar to plaintiff's promotion was her failure to file an application and take the requisite test. The suit was wholly unnecessary to achieve the relief sought and was, thus, frivolous. 485 F.Supp. at 367.

Young's belief that she was ineligible for the promotion could have been eliminated had she consulted the personnel manual.

This manual reflected the elimination of the requirement of which she complains; this action on her part would have required no legal assistance. Based on the record which included Young's entire case-in-chief, the District court found that had she "applied for the promotion she sought, she would have received it." 465 F.Supp. at 1263. In addition, the District Court found that

> "had her counsel, after he was retained, attempted in the slightest to obtain appropriate relief for his client without suit, he would have succeeded. The most elementary research would have revealed the job requirements in the personnel manual. Plaintiff and her counsel would have seen that the relief sought was already won and that a suit to obtain such relief would be a waste of time and money for all involved. In short, this action is frivolous." Young, 365 F.Supp. at 1263.

Considerations in this case are similar to those in Naprstek v. City of Norwich, 433 F.Supp. 1369 (S.D.N.Y. 1977) which the District Court cited in its opinion. The District Court at 465 F.Supp., p. 1264

quoted with approval from the Naprstek decision:

> Nor do we think Congress intended to award attorneys for burdening federal courts with unnecessary litigation when they have not even attempted to remedy their clients' grievances by talking out their differences with duly constituted executive and legislative authorities at the local level. Naprstek v. City of Norwich, supra at 1371.

Other courts have indicated that denial of attorney's fees to plaintiff's counsel would be proper where the plaintiff's suit was found to be frivolous or without foundation. See Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978); United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980).

This Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 424, 98 S.Ct. 694 (1978) held that a district court may award attorney's fees to a prevailing defendant in a Title VII case based on a finding that the plaintiff's action was frivolous and without foundation:

> Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. 98 S.Ct. 694 at 701 (1978).

Mrs. Young persisted in this action even after she learned that the requirement in question had been eliminated prior to her filing suit. The trial court had unique "familiarity with the progress of the litigation;" Maher, supra. In a pre-trial conference held June 23, 1978, District Judge Warriner, as counsel for Kenley had done previously, invited Mrs. Young to apply for the job at issue. As the District Court found, she would have obtained the position had she applied for it. Young, 465 F.Supp. at 1263.

Mrs. Young's suit was frivolous and without foundation because she sought, through legal action, a job for which she had never applied. Moreover, she continued her legal action even after it became

obvious that the sole obstacle to her obtaining the position was her failure to apply for it. These factors constitute the special circumstances contemplated by the Court in Piggie Park and authorize the district court, in its discretion, to deny plaintiff attorney's fees.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment and decisions of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

Marshall Coleman
Attorney General of Virginia

James E. Moore
Deputy Attorney General

R. Leonard Vance (Counsel of Record)
Robert T. Adams
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109 Governor Street
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Certificate of Service

I, R. Leonard Vance, Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and counsel of record for the Petitioner in the above-captioned matter, hereby certify that three (3) copies of this petition have been served upon counsel for respondent by mailing, postage prepaid this 19th day of June, 1981. Two copies were mailed to Charles M. L. Mangum and Leonard Brown at 522 Jackson Street, P. O. Box 1232, Lynchburg, Virginia, and one copy was mailed to Brent E. Simmons, 806 15th Street, N.W., Suite 940, Washington, D.C., 20006.

R. Leonard Vance
Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1205

WILLIE E. YOUNG, Appellant,

versus

DR. J. B. KENLEY, individually and as Commissioner of Health, Virginia State Department of Health; Sarah E. Sayers, individually and as Director of Public Health Nursing, Virginia State Department of Health; Wayne Harding, individually and as Director of Personnel, Virginia State Health Department; H. H. Hedley, individually and as Retired and Former Director of Personnel, Virginia State Health Department, jointly and severally, Appellees.

Appeal from the United States
District Court for the Eastern
District of Virginia, at Richmond

Before HAYNSWORTH, Chief Judge, and
BUTZNER and RUSSELL, Circuit Judges.

Brent E. Simmons, Washington, D.C. (Elaine R. Jones, Washington, D.C., Charles, M. L. Mangum, Leonard L. Brown, Jr., Lynchburg, Va., on brief), for appellant.

John R. Butcher, Richmond, Va. (Marshall Coleman, Atty. Gen. of Va., James E. Ryan, Jr., R. Leonard Vance, Robert T. Adams, Asst. Attys. Gen., Richmond, Va., on brief), for appellees.

Argued November 10, 1980. Decided February 23, 1981.

BUTZNER, Circuit Judge:

Willie E. Young appeals from an order of the district court denying for the second time her application for attorneys' fees under 42 U.S.C. §§ 1988 and 2000e-5(k). Young made this application after settlement of her suit alleging that she had been denied equal promotional opportunities as a public health nurse in the Virginia State Department of Health because of her race. In the appeal from the district court's first denial of attorneys' fees, Young v. Kenley, 614 F.2d 373 (4th Cir. 1979), we remanded the case for consideration in light of Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979).

Upon remand the district court again denied attorneys' fees. Young v. Kenley, 485 F.Supp. 365 (E.D. Va. 1980).

It concluded that although Young was a prevailing party, special circumstances justified denial of attorneys' fees as a matter of its discretion. The district court characterized Young's suit as "superfluous" because she persisted in her suit even after she learned about the elimination of a regulation that formerly had barred her advancement. Finding that Young meets the tests of Bonnes, we reverse and remand.

I

Willie E. Young is a black woman who has been employed as a public health nurse with the Virginia State Department of Health since October, 1973. She was graduated from Meharry Medical Colelge School of Nursing, a predominantly black institution, with a B.S. in 1956 and earned a master's degree in

health education at City University of New York in 1972.

Young was hired by the Central Virginia Health District as a public health nurse at the lowest level, "A," despite a request by local health officials that she be hired at the next level, "B," for which the salary was greater. The State Health Department informed Young that she was not eligible for the higher level and greater pay because Meharry had not been accredited by the National League of Nursing at the time of her graduation. After she protested the "A" classification and filed a complaint with the Virginia Equal Opportunity Coordinator, negotiations took place with officials of the Health Department. The Department decided that

by substituting, according to an established formula, previous experience for an accredited degree, Young could qualify for level "B" and promoted her.

Young received a copy of a March 3, 1975, memorandum which indicated that she could not advance to level "C" because of her non-accredited degree. On June 1, 1975, she wrote the Equal Employment Opportunity Commission in Washington, D.C., to complain about this ineligibility for promotion above level "B." She received an acknowledgment of her complaint and was assigned a charge number.

In a letter dated February, 1976, the Virginia EEO Program Specialist informed the Director of Public Health Nursing that Meharry's School of Nursing had in fact been accredited in 1956 and

that the portion of the March, 1975, memorandum denying Young's eligibility for further promotion should be disregarded. In February, 1977, the Health Department eliminated the requirement that barred Young.

Young first filed a complaint in federal court on January 25, 1978, alleging violations of 42 U.S.C. §§ 1981 and 1983. The district court dismissed the complaint because of the two-year statute of limitations but granted leave to amend. An amended complaint of April 11, 1978, added alleged violations of title VII, 42 U.S.C. § 2000e et seq. It was dismissed for failure to show receipt of a right to sue notice from the EEOC. Although Young had requested such a notice several times beginning in August, 1976, it did not issue until May

On June 23, 1978, the Deputy State Health Commissioner invited Young to apply for the position of public health nurse level "C." She passed the merit examination for the position on September 13, 1978, and received a list of level "C" vacancies elsewhere in the state for which she could apply.

Young filed her final complaint in federal district court on October 30, 1978. In it she alleged that because of her race and despite her qualification, she had been denied promotion to public health nurse level "C" since October 1, 1973, and that health officials had failed to inform her of the February, 1977, change in requirements that made her eligible for promotion.

On November 2, 1978, Young appeared for trial, but the state, because of a

misunderstanding, appeared late and unprepared. The district court heard Young's evidence and reserved the right to hear the state's evidence on November 21. On November 16, however, the parties reached a settlement. The terms of the settlement gave Young a promotion to public health nurse level "C" retroaction to March 1, 1977. She was also given $992 in back pay, and her current position was reclassified from level "B" to level "C" to avoid the need for her to relocate.

After being advised of the settlement, the district court held a separate hearing on the issue of attorneys' fees. It denied the fees, and an appeal was taken. Upon remand pursuant to Young v. Kenley, 614 F.2d 373 (4th Cir. 1979), the district court again denied attorneys' fees.

II

As we observed in Bonnes, 599 F.2d at 1318, "[t]he discretion of the district court in deciding whether to award attorney's fees to a prevailing party is narrowly limited." Furthermore, we stated:

> That civil rights litigation ends in a consent judgment does not preclude an attorney's fee award under § 1988. Consent judgments normally involve some element of compromise, of "benefit" to both parties, but the legislative history indicates that Congress intended that a plaintiff who obtained its objective through a consent judgment could be a "prevailing party" within the meaning of the statute.

The Supreme Court has recently held that fees may be assessed under § 1988 against state officials after a case has been settled by entry of a consent decree without any determination that

the plaintiff's constitutional rights have been violated. Maher v. Gagne, 448 U.S. _____, 100 S.Ct. 2570, 65 L.Ed.2d. 653 (1980).

[1] The state removed the bar that made Young ineligible for promotion before this action was filed. Even so, by this litigation Young achieved more than eligibility. She obtained her objective of actual appointment to the position of public health nurse level "C." Without the impetus of the suit, she could not have obtained part of the back pay she claimed and reclassification of her current position from "B" to does not mean that her suit was superfluous. It does not mean that her claim of discrimination was invalid as a matter of law. It simply indicates, as we noted in Bonnes, that compromise is integral to settlement.

[3] This case is readily distinguishable from Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979). In that case a statutory amendment to South Carolina's absentee ballot provision mooted plaintiffs' case. This court found that plaintiffs were not prevailing parties and denied attorneys' fees. We observed, "In order to recover attorneys' fees and costs, plaintiffs must show at least some success on the merits." 605 F.2d at 137. The substantive relief in Bly was obtained by legislative enactment which was not shown to have resulted from the judicial proceeding. Here, in contrast, settlement in the midst of trial demonstrates the lawsuit and the benefits obtained are causally related. Moreover, Young has clearly demonstrated success on the merits.

Accordingly, we reverse and remand to the district court to award reasonable attorneys' fees in accordance with the 12 factors set out in Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978), for services at both the trial and appellate levels, including those expended to resolve the issue of attorneys' fees. See Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980); Love v. Mayor, City of Cheyenne, Wyoming, 620 F.2d 235, 237 (10th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980); Bagby v. Beal, 606 F.2d 411, 415-416 (3d Cir. 1979); Gagne v. Maher, 594 F.2d 336, 343-44 (2d Cir. 1979), aff'd on other grounds, 444 U.S. 824, 100 S.Ct. 44, 62 L.Ed.2d 30 (1980).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1205

Willie E. Young,

Appellant,

versus

Dr. J. B. Kenley, etc., et al,

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner with the concurrence of Judge Jaynsworth and Judge Russell.

For the Court,

William K. Slate II
Clerk

March 24, 1981

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WILLIE E. YOUNG	)	
	)	
v.	)	CIVIL ACTION
	)	NO.78-0085-R
DR. J.B. KENLEY, et al.	)	

MEMORANDUM AND ORDER

WARRINER, District Judge.

Faced with a motion for counsel fees under 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), this Court reviewed and analyzed the factual/legal circumstances in light of the then leading case of Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). The Court denied counsel fees for the reasons set forth in its memorandum in Young v. Kenley, 465 F.Supp. 1260 (E.D.Va. 1979). On appeal the Fourth Circuit, 614 F.2d 373, noting

this Court's reliance on the Nadeau guidelines, reversed and remanded for reconsideration on the intervening guidelines formulated by the Fourth Circuit in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979). This Court directed counsel to file briefs interpreting Bonnes so the Court could properly contrast the Bonnes guidelines with those of the First Circuit in Nadeau. Plaintiff filed her brief, defendants filed their brief in response, and the time within which the rebuttal brief was required to be filed has expired. The Court will consider the matter on remand on the present state of the record.

Although Nadeau was cited with approval in Bonnes, 599 F.2d at 1318, it is apparent from the language of the unreported per curiam memorandum vacating and remanding this case, that a Nadeau analysis is inappropriate in this

Circuit. A Bonnes analysis is required. Under these circumstances, it would be helpful to obtain a contrast of Nadeau with Bonnes so the trier of fact would be guided as to what to avoid and what to consider. Unfortunately, the analyses of counsel in their briefs skim over the contrast while the Fourth Circuit in Bonnes, insofar as it refers to Nadeau, refers to it with approval. Accordingly, this Court must conduct the analysis which compares Nadeau with Bonnes to see where it went wrong in following Nadeau and in failing to anticipate Bonnes.

In its previous decision in Young v. Kenley, 465 F.Supp. 1260, 1262-63, this Court summarized the Nadeau test by quoting from Nadeau:

> Even if plaintiffs can establish that their suit was causally related to the defendant's actions

> which improved their condition, this is only half their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interest, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Applying that test this Court held that plaintiff's lawsuit contributed to the achievement of certain relief obtained in settlement, but the Court found, "the actions the defendants have taken in settlement simply could not have been required by law had this case gone forward to judgment."

Completely apart from the Nadeau test the Court found that plaintiff's lawsuit was frivolous. Citing Naprstek v. City of Norwich, 433 F.Supp. 1369 (N.D.N.Y. 1977), and Green v. Carbaugh, 460 F.Supp. 1193 (E.D.Va. 1978), the

Court noted that the central relief which plaintiff sought was the lifting of a regulation which acted as a bar to any promotions to which she might otherwise be entitled. This bar to promotion had been removed by defendants well prior to the filing of the suit and the fact of its removal had been published. Thus at the time of the filing of the suit the only bar to plaintiff's promotion was her failure to file an application and take the requisite test. The suit was wholly unnecessary to achieve the relief sought and was, thus, frivolous.

The Fourth Circuit's opinion vacating and remanding the decision of this Court did not mention this latter, separate ground for denying counsel fees nor did it question this Court's application and understanding of the Nadeau test. Accordingly, this Court will assume that

in its earlier effort it correctly understood and applied Nadeau as above set forth.

The Court will now turn to and contrast the Bonnes test. In this connection it is important to note that the Fourth Circuit questioned, not the exercise of discretion by this Court, but this Court's determination that plaintiff was a "prevailing party." The Fourth Circuit observed:

> The district court properly noted that a plaintiff whose case ends in settlement may be considered 'a prevailing party' under the civil rights attorney's fees provisions. In making its determination whether the plaintiff was in fact the 'prevailing party,' the Court applied the test set forth in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). After the district court rendered its opinion, this Court issued its decision in Bonnes. Bonnes establishes the test to be applied in this circuit for the consideration whether a party to a case which ends in settlement is a

> 'prevailing party' within the meaning of 42 U.S.C. §§ 1988 and 2000e-5(k). Accordingly, the order of the district court is vacated and the case remanded for further proceedings consistent with this opinion.

As the Fourth Circuit noted this Court had found plaintiff to be a "prevailing party" but that determination had been made by following the Nadeau test. The remand directed this Court, as this Court interprets the remand, to redetermine whether plaintiff is a prevailing party by following the Bonnes test. Bonnes notes that the attorney's fee provision, "posits two essential inquiries: whether the fee claimant is the 'prevailing party'; and, if so, whether in the court's informed discretion, a fee should be awarded."

Since the Court found, applying the Nadeau test, that plaintiff was a

prevailing party but that she should be denied counsel fees in the Court's informed discretion, it would seem that a redetermination as to whether plaintiff is a prevailing party under the Bonnes test would be merely an academic exercise. No matter what test one may use to determine the question of prevailing party vel non, if, after having made that determination, the Court nevertheless determines in its discretion that counsel fees should not be paid, the method or test by which the Court reached the determination of prevailing party may be of interest but it could not be considered as crucial to the holding. Stated differently, if, because of other considerations, counsel fees should not be awarded, the question of whether a plaintiff is a prevailing party becomes relatively immaterial. The means by which that determination was reached is

even less material.

Nevertheless, the Court will review the facts in this case to determine under the Bonnes guideline whether plaintiff is a prevailing party. Judge Phillips in Bonnes notes that:

> This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

Judge Phillips continues his explication

by citing three cases[1] which mention factors entering into a determination as to whether plaintiff is a prevailing party. The factors mentioned are: (1) whether the litigation was a "catalyst" for reforming defendant's condition; (2) whether there was a necessity for bringing the action; and (3) whether resort to the law was reasonably necessary to secure the plaintiff's rights. This Court does not assume that the three examples given by Judge Phillips are intended to be exhaustive but that they are intended to be helpful to a trial court in its determination whether plaintiff is a prevailing party in a given case.

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[1] Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429-30 (8th Cir. 1970); McCrary v. New York Life Ins. Co., 84 F.R.D. 790 (8th Cir. 1936); Howard v. Phelps, 443 F.Supp. 374, 376 (E.D.La. 1978).

Reverting to the test as quoted above, the factual/legal condition which the Court found in Young v. Kenley, 465 F.Supp. 1260, 1261-62, shows clearly that plaintiff believed there was a racially based regulation promulgated and persisted in by defendants which effectively barred plaintiff from further promotion. She sought to remove this bar or have it rendered ineffective so that she could advance in her career as a public health nurse. As was found in the previous opinion, plaintiff's suit was wholly ineffective to remove this bar to promotion since the bar had been removed by a voluntary, unrelated act of the defendants well before plaintiff's suit was instituted. Incredible as it may seem, plaintiff had never informed herself that the regulations had been changed though it was published in the official manual which was

readily available to plaintiff and her lawyer. Thus "as a quite practical matter" plaintiff's efforts in the lawsuit cannot be said to have "contributed in a significant way" to obtaining any relief for plaintiff "when measured against the benchmark condition."

Further, considering the three examples mentioned by Judge Phillips, it is abundantly clear that the lawsuit was not a "catalyst" for reformation of the regulation. The regulation had been "reformed" prior to the institution of the lawsuit. With respect to factor number two there simply was no necessity for bringing the action, hence factor number three, resort to the law, was not reasonably necessary to secure plaintiff's right.

Although there is some inevitable

overlap, under the Bonnes test, where the prevailing party test leaves off and the "special circumstance" test begins, see Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1045 (4th Cir. 1976), it would appear that under Bonnes a plaintiff may be, as plaintiff here is, better off for having filed suit and yet not be a prevailing party. Under Nadeau if plaintiff's lawsuit contributed to the achievement of the relief she received in settlement, then she is a prevailing party. Under Bonnes, this Court perceives, the question is not whether there were benefits actually received in settlement which are attributable to the lawsuit, but, instead, whether the benefits achieved in settlement are significant when measured against the "precise factual/legal condition" plaintiff sought to alter. Considering the "benchmark," is there "an actual

conferral of benefit or relief" in the settlement when measured against the benchmark? This appears to be the Bonnes prevailing party test.

Thus, while Nadeau looks merely to the question of whether, as a matter of fact, some benefit was achieved, Bonnes asks whether, considering what plaintiff sought to achieve, the benefit actually achieved when pragmatically considered actually amounts to a benefit. Both tests require that the suit be found to have "contributed in a significant way" to the attainment of the benefit.

The Nadeau test is one which is, by far, the more easy to apply. Nadeau says: "Did the lawsuit contribute to the relief achieved in settlement?" Bonnes says: "Did the lawsuit, when measured against the relief sought, result in a

benefit in settlement?"

As outlined above, and as outlined more fully in the original opinion, plaintiff did not achieve through the settlement of this case either her promotion or the removal of the regulatory bar to promotion. The bar had already been removed. She received her promotion upon the filing of an application and the successful completion of the promotional test during the pendency of this suit. She did achieve as a result of the settlement benefits which she was not entitled to under the law or facts, i.e., back pay and the reclassification of her job so as to permit her to accept the promotion without having to move to a new location. Though neither of these benefits is insignificant, when measured pragmatically against the benchmark, the relief is marginal. It is extremely

doubtful under the "intensely pragmatic" Bonnes test that it would be appropriate to find plaintiff a "prevailing party." The back pay amounted to less than $1,000 and reclassification of plaintiff's previous position, while a substantial convenience to plaintiff, is not the stuff of which lawsuits should be framed. It could never be considered even remotely as an entitlement achievable through the suit. Nevertheless, the Court is constrained to find plaintiff a prevailing party under the Bonnes test as well as under the Nadeau test. This finding is, quite frankly, by the thinnest of margins.

Having applied the prevailing party test, Bonnes, as did Nadeau, directs the Court to apply a second test. Nadeau describes the second test as a legal one. Simply put, if the benefit conferred in

settlement is one which plaintiff could not have required by law, then the benefit amounts to a mere gratuity, a lagniappe, and plaintiff cannot be considered to have "prevailed in a legal sense."

Though the instant case was remanded for this Court to reconsider its determination that plaintiff was a prevailing party, applying the Bonnes rather than the Nadeau test, that question, as the Court has heretofore noted, appears academic. The prevailing appellant had already been adjudged a prevailing party and she could not conceivably benefit from any reanalysis on remand under a different test.[2]

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[2]As noted, while plaintiff-appellant passed the Nadeau test with flying colors, on remand she barely manages to pass Bonnes. If the determination of whether plaintiff is a prevailing party were critical to the decision on remand,

Defendants may have wanted a re-examination, but not plaintiff. This Court must surmise that though the language of the opinion of the Court of Appeals directed a re-examination on remand of plaintiff's status as a prevailing party, the focus of the Fourth Circuit's concern may well have been on the application of the second prong Nadeau legal test as against the second prong Bonnes "special circumstances" test. Accordingly, though the remand directs a reconsideration under Bonnes of its determination that plaintiff was a prevailing party this Court does not believe that it would be straying outside the bounds of the remand if it also re-analyzes the second prong of the test.

([2]Cont'd.)
this Court must confess that it would feel obliged to reanalyze its re-analysis.

Under Nadeau all the trier of fact need do is determine whether the relief attained, under all the facts and circumstances known to the Court at the time, was a benefit which plaintiff legally could have required of defendant. If not, then plaintiff cannot be said to have prevailed in the legal sense.

Bonnes, on the other hand, characterizes the second prong as a "special circumstances" test and directs the trial court to focus, "upon the justice under the total range of circumstances of conferring the benefit and imposing the concomitant burden represented by the fee award." This discretion is to be exercised bearing in mind the general remedial purpose to encourage "private attorney general" legal actions.

Applying this test upon the factual

background set out in the prior opinion, this Court finds that it would be unjust to impose the benefit of attorney's fees upon plaintiff and the burden of attorney's fees upon defendants. The Court must consider the fact that plaintiff, if she ever had a grievance against defendants, did not have one at the time she instituted her action for any of the reasons stated in her complaint. She alleged the existence of a regulation, which she claimed barred her from further advancement. No such regulation existed and the fact of its nonexistence was knowledge readily within the grasp of plaintiff. When told, informally, after the filing of the lawsuit that she was simply incorrect in alleging the existence of the bar to her promotion, she persisted in the suit, inexplicably, causing defendants to incur doubly unnecessary expense. Even when

formally apprised that the regulation was and had been for some time amended, plaintiff pursued her lawsuit at substantial expense and trouble to defendants.

The Court has never questioned plaintiff's sincerity nor her good faith. The Court must question her failure to consult the manual before filing suit, her failure to appreciate the changes in the manual when they were pointed out to her, and her persistence in continuing with the suit despite a clear knowledge which would lead a reasoning mind to appreciate that the continuance was, at the least, inappropriate.

It is true that her persistence paid off in the benefits conferred upon her in settlement. But such persistence, under

all the circumstances of this case, ought not to be encouraged. While actions by "private attorneys general" are to be rewarded under the attorney's fees provision, it could not be intended that a party be encouraged to file a suit where litigation would be superfluous. A benefit which can be obtained by an informal request need not be the subject of a formal demand.

For these reasons as well as the reasons set forth in the former opinion, the Court believes that there exists special circumstances which render the award of counsel fees to plaintiff, even if she be a prevailing party, unjust in this case.

And it is so ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1234

WILLIE E. YOUNG, Appellant,

v.

Dr. J. B. KENLEY, Individually and as Commissioner of Health, Virginia State Department of Health; Sarah E. Sayers, Individually and as Director of Public Health Nursing, Virginia State Department of Health; Wayne Harding, Individually and as Director of Personnel, Virginia State Department of Health; H. H. Hedley, Individually and as retired and Former Director of Personnel, Virginia State Department of Health, Jointly and severally, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, D. Dortch Warriner, District Judge

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Argued November 8, 1979
Decided December 11, 1979

Before Haynsworth, Chief Judge, and Russell and Sprouse, Circuit Judges

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Brent E. Simmons, New York City (Elaine R. Jones, New York City, Charles M. L. Mangum, Leonard L. Brown, Jr., Lynchburg, Virginia, on brief), for appellant.

John R. Butcher, Richmond, Virginia, (R. Leonard Vance, Robert T. Adams, Assistant Attorney General, Richmond, Virginia, on brief) for appellees.

PER CURIAM:

Plaintiff filed a civil rights action under 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The action was settled during trial. Plaintiff moved for an award of attorney's fees pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k), contending that she was the "prevailing party." The district court denied such relief, Young v. Kenley, 465 F.Supp. 1260 (E.D. Va.1979), and plaintiff appeals. We vacate the district court's order and remand for consideration of plaintiff's application in light of this court's recent opinion in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979).

[1,2] The district court properly noted that a plaintiff whose case ends in settlement may be considered a "prevailing party" under the civil rights attorney's fees provisions. In

making its determination whether the plaintiff was in fact the "prevailing party," the court applied the test set forth in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). After the district court rendered its opinion, this court issued its decision in Bonnes. Bonnes establishes the test to be applied in this circuit for the consideration whether a party to a case which ends in settlement is a "prevailing party" within the meaning of 42 U.S.C. §§ 1988 and 2000e-5(k).

Accordingly, the order of the district court is vacated and the case remanded for further proceedings consistent with his opinion.

VACATED AND REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WILLIE E. YOUNG	)	
	)	
v.	)	CIVIL ACTION
	)	NO: 78-0085-R
Dr. J. B. KENLEY, et al	)	

MEMORANDUM

WARRINER, District Judge.

This case presents a difficult problem in the interpretation and application of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, and the attorney's fees award provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k). Each of these statutes

provides that the Court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs in an action brought, as this one was, under either Title VII or under 42 U.S.C. § 1983. The legislative history of the 1976 Act makes it clear that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." Senate Rep. No. 74-1011, 1976 U.S. Code Cong. & Admin. News, p. 5912.

Plaintiff Willie E. Young filed this suit on 25 January 1978, alleging that she had been denied promotion in the Virginia State Department of Health on account of her race. Plaintiff's complaint was totally inadequate to state a claim on which relief could be granted, and a motion to dismiss was granted by the Court on 23 March 1978.

Plaintiff was granted leave to file a amended complaint, which she did on 11 April 1978. This complaint, too, was inadequate to support jurisdiction over plaintiff's Title VII claim and, furthermore, did not allege a Section 1983 claim within the applicable statute of limitations. Accordingly, plaintiff's amended complaint was dismissed on 16 June 1978, though again the Court granted leave for plaintiff to amend her complaint to show Title VII jurisdiction and to allege a violation of § 1983 which was shown to have occurred within the applicable period of limitations. On 3 July 1978 plaintiff filed an affidavit which set forth the basis for Title VII jurisdiction.

In response to yet another motion by defendants, on 19 October 1978 the Court once again dismissed plaintiff's complaint. This time the Court gave plaintiff explicit directions for pleading her Title VII action against

the appropriate defendant, and also indicated to plaintiff what facts might properly be pleaded to assert a violation of her rights under § 1983 within the applicable period of limitation. A pleading in response to this order was filed by plaintiff on 30 October 1978, four days after the time granted by the Court for the filing of such a pleading had expired and only three days before the date set for trial.

On 10 [sic] November 1978 the matter came on for trial on the merits and the plaintiff adduced her evidence and rested. The matter was continued to a later date for the hearing of defendant's evidence. Before that date arrived, the parties agreed to a settlement which is more fully described below. Now the matter is before the Court on plaintiff's counsel's motion for attorney's fees.

Plaintiff's claim, as finally presented by the proof at trial, rested upon the following circumstances. In 1956 the plaintiff graduated from Meharry Medical College School of Nursing in Nashville, Tennessee, a predominantly black nursing school. When plaintiff graduated from Meharry, the baccalaureate program in nursing at Meharry was accredited by the National League for Nursing. However, Meharry was not accredited by the League in the field of public health nursing.

In 1973 plaintiff was hired as a Public Health Nurse Grade Level "A" (PHN-A) by the Virginia Department of Health. Plaintiff, claiming racial discrimination, sucessfully sought promotion to PHN-B without being required to take the promotion examination for that position. However, it was noted at that time that plaintiff would not be qualified for promotion to PHN-C because she had not been graduated from

a nursing school accredited in public health nursing. Until February 1977 the specification for the job of PHN-C in the Virginia Department of Health included a requirement of a degree from a nursing school accredited in public health nursing.

This requirement, however, was out of date. In 1964 the National League for Nursing had changed its accreditation so that it no longer gave separate accreditation for both general nursing and public health nursing. After 1964, no school was accredited for nursing unless it was also accredited for public health nursing. Thirteen years after the fact, the Virginia Department of Health changed its job specifications for PHN-C to eliminate the requirement of accreditation in public health nursing. The plaintiff was never specifically told prior to the filing of this law suit that the job specification for PHN-C had changed.

However, plaintiff did have ready access to the personnel manual in which the change was published. Prior to filing her law suit the plaintiff did not make a formal application for promotion to PHN-C because she felt that such an application would be a futile exercise. The law suit was filed, as previously noted, on 25 January 1978. On 23 June 1978 the plaintiff was specifically informed that the job specifications had been changed and that she was eligible for promotion to PHN-C, and she was invited to apply for that promotion. After some delay plaintiff did apply for this promotion, and successfully passed the promotional test before her case went to trial.

At trial, plaintiff's claims had been reduced to two. Her first claim was that she had been barred from promotion to PHN-C by the requirement that a person seeking to be promoted to level C be a graduate of a nursing school

accredited in public health nursing. Plaintiff claimed that Meharry was not accredited in public heath nursing by the white-dominated accrediting agency, the National League for Nursing, because the League discriminated against blacks. Plaintiff further claimed that the defendant Department of Health recognized and gave credence to the League's refusal to accredit Meharry in public health nursing despite the racially discriminatory nature of this refusal, either purposefully to deny blacks promotional opportunities or despite its adverse impact on blacks, in violation of § 1983 and Title VII.

Plaintiff's second claim was that the individual defendants, cognizant of the earlier information given plaintiff that she was ineligible, and aware of the fact that the new regulation removed plaintiff's disability and made her eligible for promotion, neverthe-

less because of her race, deliberately, willfully and maliciously failed to inform her of the change in the regulations, having a duty to so inform her.

In settlement of this action plaintiff received a promotion to PHN-C, a payment $900.00 and a reclassification of her former PHN-B position with the Department of Health in Bedford, Virginia, as a PHN-C position. Without a reclassification of her job, plaintiff would have to leave Bedford and move elsewhere in Virginia where a Level C position was available. On the basis of this settlement, plaintiff's counsel now seeks an award of attorney's fees.

[1] It is well settled that a plaintiff whose suit is ended by settlement may still be considered a "prevailing party" within the meaning of §§ 1988 and 2000e-5(k). The leading case on this question is Nadeau v.

Helgemoe, 581 F.2d 275 (1st Cir. 1978). Nadeau establishes two tests, one factual and the other legal, which plaintiff must pass in order to be considered a prevailing party. The Court concludes that although Mrs. Young can fulfill the factual test for prevailing, she cannot meet the legal test and her motion for an award of attorney's fees must be denied.

The first Nadeau test is a factual test: did the plaintiff's law suit contribute to the achievement of her relief, or was it completely superfluous to the benefits which she received? In the present case, the record shows that the policy which plaintiff claimed barred her from promotion had been revised to remove the bar to her advancement well prior to the institution of this suit. The revision was openly promulgated through defendant's personnel manual and plaintiff had constructive knowledge of the

change, even if she had no actual knowledge of it.

On the basis of the evidence and the record in this case, the Court finds that had plaintiff, at any time during the period from February 1977, when the revision was drawn, to January 1978, when this suit was filed, applied for the promotion she sought, she would have received it. Also, had her counsel, after he was retained, attempted in the slightest to obtain appropriate relief for his client without suit he would have succeeded. The most elementary research would have revealed the job requirements in the personnel manual. Plaintiff and her counsel would have seen that the relief sought was already won and that a suit to obtain such relief would be a waste of time and money for all involved. In short, this action is frivolous. This is itself relevant to the Court's attorney's fees decision, as will be

seen more fully below.

However, the Court cannot say plaintiff's law suit was completely superfluous in bringing about the benefits she received. Without her suit, plaintiff would have received neither the award of back pay nor the reclassification of her job in Bedford to permit her to accept a promotion and still remain in Bedford. The Court does, however, regard plaintiff's law suit as completely superfluous to her central relief--a promotion. Nevertheless, plaintiff must be held to have prevailed under the factual tests in Nadeau, because of the monetary settlement and the reclassification of her job.

Thus, the Court must turn to the second test found in Nadeau. This test is expressed as follows in Nadeau:

> Even if plaintiffs can establish that their suit was causally related to the defendant's actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. It it [sic] has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interest, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense. [581 F.2d at 281]

The Court has heard the evidence presented by the plaintiff in this case, and concludes that the actions the defendants have taken in settlement simply could not have been required by law had this case gone forward to judgment.

The Court has had "sufficient exposure to the facts and law of this case" [581F.2d at 281] to determine that this

case clearly has not been proved. There is absolutely no evidence tending to show that the National League for Nursing failed to accredit Meharry in public health nursing because Meharry was a predominately black school. Plaintiff asks the Court to infer racial discrimination on the part of the League because the League was white-dominated. The Court will not indulge in such a race-based inference, which smacks of a per se rule that white-dominated agencies presumptively deal unfairly with black persons and institutions.

Further, although it was proved that the Department of Health used the accrediting service of the League in its regulations, it was not proved that this was done for the purpose of discriminating against blacks. Nor was it proved that the practice had a disproportionate impact upon blacks. There is, in fact, no evidence of

differential impact at all.

Nor has plaintiff proved that the individual defendants had a duty to inform her of the change in the regulation and failed to do so because she is black. The record is entirely devoid of any support for that contention or any evidence upon which the Court could base a finding that plaintiff's rights under § 1983 had been violated by the individual defendants in this case in that manner.

The Court notes that at the time settlement was reached between plaintiff and defendants, plaintiff had introduced all of her evidence and had failed to prove her case. In ruling on defendants' motion to strike at the close of plaintiff's evidence, the Court denied the motion and required defendants to prepare to present their evidence without prejudice to their right to renew the motion at the close

of all the evidence. Further reflection and review of transcript in this case convinces the Court that defendants' motion should have been granted. For all the foregoing the Court concludes that defendants acted gratuitously in settling with the plaintiff.

[2] Thus, although plaintiff would not have received an award of back [sic] and the redesignation of her present position as a PHN-C position without the leverage of this suit, she was not legally entitled to either form of relief nor to any other relief. It is apparent to the Court that this lagniappe was a consequence of defendants' desire to rectify their failure specifically and personally to advise plaintiff of the change in their regulations--advice they had no legal obligation to give but which would not have been inappropriate under the circumstances. Accordingly, the rule in Nadeau would preclude the award of

attorney's fees in this action.

In addition, the Court bases its determination to deny plaintiff's motion for attorney's fees on its finding that plaintiff's lawsuit was frivolous. The Court's concern is very similar to that expressed by the court in Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y.1977). Plaintiffs in that case attacked an "antiquated, poorly-drafted, rarely-enforced juvenile curfew ordinance." The ordinance was found void for vagueness and plaintiffs' attorneys sought fees under § 1988. The district court denied the award of attorney's fees because it found that the law suit was frivolous and unnecessary however successful it had been. The Court said:

> Nor do we think Congress intended to award attorneys for burdening federal courts with unnecessary litigation when they have not even attempted to remedy

their clients' grievances by talking out their differences with duly constituted executive and legislative authorities at the local level. [433 F. Supp. 1371]

This consideration relates not to the question of whether Mrs. Young is a prevailing party in this law suit, but rather to the question of whether Congress intended that attorney's fees be awarded under § 1988 or Title VII in such an action as this one--an action which need never have been filed. See Green v. Carbaugh, 460 F. Supp. 1193 (E.D. Va. #1978). Accordingly, for this reason also the Court concludes that an award of attorney's fees is not justified.

[3] Finally plaintiff complains that defendants' failure to prepare for trial at the time set caused plaintiff and her counsel to make an extra trip from Lynchburg to Richmond. This point

is well taken. Defendants shall be required to reimburse counsel for plaintiff his cost, expenses and time for this unnecessary excursion. Plaintiff's attorneys, Charles M. L. Mangum and Leonard Brown, Jr., each spent four hours in court on 2 November 1978 and approximately four additional hours in travel. Defendants will be required to reimburse Mr. Mangum at a rate of $50.00 per hour, and Mr. Brown at a rate of $30.00 per hour for the eight hours thus spent. In addition, defendants shall be required to reimburse plaintiff's counsel for their mileage to Richmond, $42.50, and for tolls and parking paid, $2.50.

An appropriate order shall issue.

APPENDIX E

42 U.S.C § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having

jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs.

APPENDIX F

42 U.S.C. § 2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private persons.

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. J.B. KENLEY, *et al.*,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the First Circuit's decision in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) conflict with the Fourth Circuit's decision in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), with respect to determining a "prevailing party" under federal civil rights attorneys fees statutes where the suit is terminated by a settlement.

2. Did the Fourth Circuit correctly find that plaintiffs' suit was neither frivolous nor involved "special circumstances" in reversing the district court's abuse of discretion in denying an award of attorney's fees.

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No. 80-2153

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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DR. J.B. KENLEY, et al.,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

==========

Petition For Writ of Certiorari to
The United States Court of Appeals
For The Fourth Circuit

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Mrs. Willie Young, filed two separate administrative complaints against Petitioners. The first, filed on December 23, 1974 with the Equal Employment

Opportunity Coordinator for the State of Virginia, resulted in her promotion to Public Health Nurse Grade Level B. Petitioner Sayres acknowledged in a memorandum dated February 3, 1975, that the State's Bureau of Nursing had been "negligent" in not crediting Respondent's prior experience in public health nursing in the State of New York.

Respondent's second administrative complaint was based on two other memoranda -- dated June 13, 1974 and March 3, 1975 -- both of which stated that Respondent would be ineligible for promotion to supervisory level Public Health Nurse "C". At least one of the memoranda was placed in her personnel file. Both memoranda effectively constituted a permanent bar to Respondent's promotion, until the promotional requirements were themselves changed

in February, 1977, two years later. Mrs. Young complained and on June 20, 1975 filed with the Equal Employment Opportunity Commission. Petitioners were duly notified of the EEOC charge on June 30, 1975.

Subsequent to filing her charge, the EEOC "lost" Mrs. Young's file. She made repeated requests for a Notice of Right to Sue and finally initiated her suit in January 1978, the statutory period of 180 days having long since passed. The EEOC, however, did finally issue a Notice of Right to Sue on May 2, 1978.

Notwithstanding the change in promotional requirements in February, 1977, Mrs. Young's EEOC charge remained pending; the memorandum barring her promotion remained in her file; and, as alleged in her complaint, Mrs. Young was qualified for the position of Public Health Nurse "C" since

the date of her employment in 1973. The new requirements of February 1977, while making her eligible as of that date, did not provide for retroactive promotion or other relief.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. This Case Presents No Conflict Between Circuit Courts Concerning the Definition of a Prevailing Party Under Civil Rights Statutes Where a Suit Is Terminated by a Settlement

Petitioners argue that the First and Fourth Circuits have articulated "different" tests to determine whether a plaintiff is to be considered a prevailing party. Petition for Writ of Certiorari, at 12. Different tests, however, are not necessarily conflicting tests and petitioners have failed to show actual conflict sufficient to warrant this Court's invocation of jurisdiction under United States Supreme Court Rule 17.1(a). Conflict

between Circuits is not established merely because different outcomes are possible on the facts of a single case, even though "different" tests were utilized.

More importantly, there is no conflict between Circuits since the "two-prong test" being advanced by Petitioners simply does not apply to suits terminated by settlements, as was plainly stated by the First Circuit itself in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1975). In Nadeau, plaintiffs had succeeded with respect to a claim for greater access to prison library facilities, but their cause had been remanded for further trial concerning other conditions of confinement. Before trial resumed, however, a consent decree was entered. Attorneys' fees were denied by the district court and the matter was again brought before the First Circuit, resulting

in the opinion on which Petitioners now rely.

> As the First Circuit noted in Nadeau: In the present case the legal issues were still in dispute at the time the consent decree was signed and there has never been a final judicial determination of whether or not defendant deprived plaintiffs of their constitutional rights. (Emphasis added).

581 F.2d at 280. The "two-prong test" relied upon by the district court in the present action is included in the following dicta from Nadeau:

> Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendant's conduct however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a

> legal sense. See Taylor v. Safeway Stores, Inc., supra. In the present case ... there has not yet been a judicial determination of whether plaintiffs' rights were violated under traditional standards of analysis. (Emphasis added).

581 F.2d at 281. The First Circuit plainly held that the "two-prong" test above cited did not apply to the case before it -- nor does it apply to the present action -- because the matter had settled prior to a final judicial determination of the disputed legal issues.

The point is further clarified by reference to the cited case of Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975). There, following a full trial, the court had ruled that plaintiff had failed to prove a pattern of class-wide discrimination. A short time after the suit, the defendant employer initiated a new affirmative action program. The

plaintiff went back to court seeking an award of fees, arguing that his suit was the catalyst behind the defendant's new affirmative action program. The Tenth Circuit held that since no legal liability had been established at trial against the defendant, his actions were gratuitous and fees were therefore denied. Taylor is, of course, readily distinguishable from the facts in Nadeau and the present action where both suits were terminated prior to a final judicial determination of the legal issues.[1/]

1/ The First Circuit in Nadeau went on to state that where a court has had "sufficient exposure to the facts and law of the case" it can "determine" if the action is frivolous and cites Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). This Court is not being called upon to consider that dubious holding. The district court in the present action, however, was clearly erroneous in its reformulation of the Nadeau standard: "The Court has had suffi-

On the other hand, the First Circuit did hold: "we conclude that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit". Nadeau, 581 F.2d at 279. The Fourth Circuit in Bonnes v. Long, 599 F.2d 1316, 1318 (4th cir. 1979), in fact cites Nadeau on that very point.

1/ continued

cient exposure to the facts and law of this case to determine that this case clearly has not been proved". (Emphasis added). See Appendix D to Petition, pp. 13-14. It is entirely inappropriate for a court to go forward to a judgment on the merits of a claim after the suit has settled. See Flinn v. FMC Corp., 528 F.2d 1169, 1172-3 (4th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169, 1214 n. 69 (5th Cir. 1978); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); City of Detroit v. Grinnel Corp., 495 F.2d 448, 456 (2nd Cir. 1974); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975).

The Fourth Circuit goes on to state that the appropriate inquiry is a pragmatic one which turns on whether or not "the plaintiff fee claimant's efforts (in filing suit) contributed in a significant way" to "an actual conferral of benefit or relief from burden". 599 F.2d at 1319. Thus, the Fourth Circuit actually considered and relied on the First Circuit's holding in Nadeau in formulating the Bonnes test.

There being no conflict between the two circuits the petition for a writ of certiorari should be denied.

II. Plaintiff's Suit Was Not Frivolous, But Was Essential To Recovery of Relief For Denial of Promotional Opportunity And Was Causally Related to The Benefits Received At Settlement

Petitioners allege that had Mrs. Young applied for promotion at any point after February 1977, she would have been promoted and her suit need never have been filed.

Petitioners totally ignore the fact that Mrs. Young had filed an administrative complaint against the written bar to her promotion two years prior to February, 1977. Given that express bar, Mrs. Young was under no duty to engage in the "futile gesture" of filing an application for promotion. Teamsters v. United States, 431 U.S. 324, 366 (1977).

The district court in its first decision of March 1, 1979 was compelled to note:

> the Court cannot say plaintiff's law suit was completely superfluous in bringing about the benefits she received. Without her suit, plaintiff would have received neither the award of back pay nor the reclassification of her job in Bedford to permit her to accept a promotion and still remain in Bedford.

Young v. Kenley, 465 F. Supp. 1260 (E.D. Va. 1979); Petition Appendix D, at 12. The Fourth Circuit noted that these same

benefits were derived as part of the "compromise ... integral to settlement" and that they were "causally related" to the lawsuit. Young v. Kenley, 641 F.2d 192 (4th Cir. 1981); Petition Appendix A, at 11 and 12.

The Fourth Circuit correctly ruled that Mrs. Young's suit was not frivolous and that there were no "special circumstances" on which to deny an award of attorney's fees.

CONCLUSION

On the basis of the foregoing the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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